

EXHIBIT B

1 UNITED STATES BANKRUPTCY COURT
2 DISTRICT OF DELAWARE
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5 In re: :
6 : Chapter 11
7 :
8 FRESH & EASY, LLC : Case No. 15-12220
9 :
10 Debtors. : (Joint Administration
11 : Requested)
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United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

March 3, 2016
1:37 p.m. - 1:46 p.m.

21 B E F O R E :
22 HON BRENDAN L. SHANNON
23 U.S. BANKRUPTCY JUDGE
24

25 ECRO OPERATOR: MICHAEL MILLER

1 HEARING re Debtor's Motion for an Order, Pursuant to
2 Sections 105 and 363 of the Bankruptcy Code, (I) Authorizing
3 the Debtor to Enter into That Certain Second Post-Petition
4 Services Agreement with Tesco Stores Limited and (II)
5 Granting Related Relief (Filed February 19, 2016) (Docket
6 No. 604)

7
8 HEARING re Motion of Darlene Lewis for Class Certification
9 and Related Relief (Filed January 13, 2016) (Docket No. 466)

10
11 HEARING re Motion for Order Applying Fed. R. Bankr. P. 7023,
12 Pursuant to Fed. R. Bankr. P. 9014(c), to Motion for Class
13 Certification and Related Relief (Filed January 13, 2016)
14 (Docket No. 467)

15
16 HEARING re Motion for Entry of an Order Requiring Certain
17 Entities to Provide Information Pursuant to Bankruptcy Rule
18 2004 (Filed February 5, 2016) (Docket No. 568)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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4 Attorney for Creditor's Committee

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6 BY: L. JOHN BIRD

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9 Attorney for Darlene Lewis

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11 BY: EDWARD J. KOSMOWSKI

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13 YOUNG CONAWAY STARGATT & TAYLOR

14 Attorney for Debtor

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16 BY: SHARON ZIEG

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19 Attorney for YFE Holdings

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21 BY: JOHN H. KNIGHT

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1 UNITED STATES DEPARTMENT OF JUSTICE

2 Attorney for the US Trustee

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4 BY: NATALIE COX

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11 BY: NORMAN PERNICK

12

13 ALSO PRESENT TELEPHONICALLY:

14

15 AMIR AGAM

16 JOSHUA D. BUCK

17 TOM P. CORRIGAN

18 JESSE A. CRIPPS

19 JACK RAISNER

20 KAHN A. SCOLNICK

21 MAURICE M. SUH

22 MICHAEL A. SWEET

23 DAVID T. VAN PELT

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P R O C E E D I N G S

THE COURT: Please be seated. Good afternoon.

MR. PERNICK: Good afternoon, Your Honor.

THE COURT: Mr. Pernick, good to see you.

MR. PERNICK: Good to see you, Your Honor. Your Honor, Norman Pernick for the Debtors, Fresh & Easy. Your Honor, today it's all about you. I guess it always is all about you, but today is all about you.

THE COURT: That's how I see it.

MR. PERNICK: You were kind enough to actually sign an Order Number One, which was Tesco.

THE COURT: Mm hmm.

MR. PERNICK: And Number Four, there's actually two stipulations. Both were submitted on certification of counsel. You signed one, I think?

THE COURT: Right.

MR. PERNICK: And there's another one. I don't know if you have a question or anything.

THE COURT: I don't have a question. I thought that I had signed both, so maybe the other one didn't get to the docket. If you don't see that by the end of the day, then give us a call and we'll track it down, but I'm pretty certain that that's been signed. Ms. Zieg, good to see you.

MS. ZIEG: Good afternoon, Your Honor.

MR. PERNICK: And then that just leaves the two

1 rulings for Two and Three.

2 THE COURT: The classification issues, the class
3 certification.

4 MR. PERNICK: Mm hmm.

5 THE COURT: Okay, and I'm prepared to proceed on
6 that.

7 MR. PERNICK: Thank you.

8 THE COURT: And again, I appreciate everyone's
9 time and patience with this matter. As we discussed at our
10 last hearing, I wanted the opportunity to make sure I
11 understood the applicable case law and how to apply the
12 tests that the Courts had developed.

13 So these are Agenda Items Two and Three, and as
14 stated, I took under advisement the motion of Darlene Lewis
15 for class certification, as well as the motion for an Order
16 Applying Rule 7023. These motions seek certification of a
17 class that consists of all former Nevada and Arizona
18 employees of the Debtor who have not paid their accrued and
19 unused PTO wages at the time of their separation of
20 employment.

21 At the hearing on the 18th of February, as noted,
22 I did hear an argument from counsel. And I know from the
23 record that I'm giving my ruling orally because of the
24 nature of the relief requested. And in the context of this
25 case, the parties desire for prompt disposition of this

1 matter.

2 And for the reasons that I will share with you, I
3 will deny the certification motions. Case law teaches that
4 class claims should be sparingly used in bankruptcy. And
5 many of the policy considerations that support class actions
6 are absent in bankruptcy proceedings because the costly
7 barriers to traditional civil litigation and prosecution of
8 claims are significantly reduced in bankruptcy by the claims
9 allowance process.

10 So determining whether to grant class
11 certification involves two steps. First, the Court must
12 decide whether to apply Federal Rule 23 to the contested
13 matter. And if the Court decides that Rule 23 applies, then
14 the Court has to determine if the punitive class then
15 satisfies the requirements of Rule 23.

16 And MF Global is probably the leading bankruptcy
17 court decision in this matter. And then, if and only if the
18 Court decides to apply Rule 23, does it then determine
19 whether the requirements of Rule 23 are met? This two-step
20 process is discussed in MF Global, as well as in the Ephedra
21 Products case. And both parties have briefed it
22 extensively.

23 As noted, Bankruptcy Rule 7023 expressly allows
24 class certification and adversary proceedings by
25 incorporating Rule 23. And application of Rule 23 is

1 extended to contested matters by Bankruptcy Rule 9014, which
2 then grants the Court discretion to apply Rule 23 to a
3 contested matter.

4 And for Bankruptcy Rule 7023 to become applicable,
5 the Court must specifically find that it applies to the
6 class claim filing and the objection process. The code of
7 the Bankruptcy Rules do not specifically direct how a Court
8 should address its discretion or exercise its discretion in
9 deciding whether to apply Rule 7023.

10 And there is a well-developed body of case laws I
11 noted that suggest the Courts should follow or should
12 consider the two following factors in determining the
13 application of 7023. First, whether the class was certified
14 pre-petition. Second, whether the members of the punitive
15 class received notice of the bar date in the bankruptcy
16 proceeding.

17 And third, whether class certification will
18 adversely affect the administration of the case. And again,
19 these are I think well established standards, both recently
20 or both parties have again cited to the Musicland Holding
21 Corp. from the Southern District.

22 In the present case, there was not a class
23 certified pre-petition, and all employees have received
24 notice of the bar date. I do note that the failure to
25 certify a class on a pre-petition basis, while one of the

1 considerations, is not fatal, given the circumstances of
2 this and other cases which show a fairly close nexus in time
3 between the events giving rise to potential class claims and
4 the bankruptcy proceeding.

5 But here also, the movement did not file an
6 adversary proceeding until the 17th of February 2016, which
7 was the day before the Court held its hearing on the
8 certification motion. And the record does support a
9 determination that granting class certification in this case
10 would adversely impact the administration of the case by
11 adding unnecessary layers of procedural and factual
12 complexity.

13 And I acknowledge that this case is only about
14 four months old, but in the bankruptcy world, this case is
15 actually well underway and fairly well developed. The bar
16 date has passed. The Debtor has received final approval to
17 continue its store closing, a program that is well underway.
18 And Hilco has been actively liquidating the Debtor's storage
19 now for several months.

20 Approving class certification at this juncture, I
21 fear, would disrupt the progress of the case by inevitably
22 delaying potential distributions to Creditors. The bar date
23 was February 16, 2016, and the Debtor is in the mix of
24 reviewing claims. And the Debtor has advised that it will
25 be moving forward promptly with the claims in allowance and

1 objection process.

2 Moreover, I find that entirely switching gears in
3 this case by granting the certification motion frankly risks
4 depletion of what I believe are already relatively limited
5 funds available to Creditors. I make no comment following
6 our colloquy at the last hearing, as to whether or not this
7 case may be or may become administratively insolvent.
8 That's not before me today.

9 But based on my experience and the pleadings thus
10 far, I do believe that it is fair to say that this is not a
11 case that is flush with cash. And so, in deciding whether
12 to rule -- apply Rule 7023, the Court must decide and
13 consider whether the benefit to the class members justifies
14 the costs to the estate.

15 And again, this is a factor considered both in MF
16 Global, as well as recently in Ephedra. The cost of the
17 estate here, I believe, could be substantial, because the
18 Debtor would have to both defend against the class action,
19 and frankly likely pay for class claimants counsel fees.

20 Any foreseeable benefit to class members would be
21 minimal, at least on the facts thus developed in this case.
22 Keeping the PTO claimants squarely within the claims
23 allowance process more efficiently disposes of their claims
24 in an expedited manner.

25 And the Court observes that it is more than

1 prepared and more than experienced to afford prompt and
2 efficient mechanisms to allow those claimants to press their
3 claims to appear telephonically or otherwise, and again, to
4 address these issues squarely and quickly.

5 So as noted, keeping them in the claims allowance
6 process, I think affords an opportunity to dispose of the
7 claims in an expedited manner. And I note that there's
8 always a -- there is already an established mechanism that's
9 in place for notifying the PTO claimants and managing a
10 large number of different types of PTO claims.

11 And again, it does seem that there are at least
12 several different flavors of claim for priority. Some of
13 those claims may be capped, and there may be differences
14 based upon where the particular claimant or former employee
15 is based.

16 And so, therefore, based upon the reasons that
17 I've stated, the Court does find that Rule 23 should not be
18 applied in this instance. And because Rule 23 does not
19 apply, I will not need to and do not reach the question of
20 whether the requirements of Rule 23 have in fact been
21 satisfied. Are there any questions? Okay.

22 I would ask that the parties confer and promptly
23 submit an order under certification that's consistent with
24 my ruling. Mr. Pernick, anything further today?

25 MR. PERNICK: No, Your Honor. Thank you very

1 much.

2 THE COURT: All right. Again, I appreciate
3 everyone's time. I certainly appreciate the argument last
4 week and the opportunity to study the submissions and to
5 deal with this issue. And we will stand in recess. Thank
6 you very much.

7 MS. ZIEG: Thank you.

8 MR. PERNICK: Thank you, Your Honor.

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RULINGS

DESCRIPTION

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Certification motions denied

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Ledanski Hyde

Digitally signed by Sonya Ledanski
Hyde
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Sonya Ledanski Hyde

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Date: March 10, 2016